

The Polar Code and its influence on the legal status of the Northwest Passage and implications of its potential use

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Aims and objectives

- To identify who has jurisdictional authority over the Northwest Passage (the Passage)
 - Maritime safety
 - Environmental protection
- Increasing maritime activities resulted from melting sea ice

Outline of presentation

- Overview of the Northwest Passage
- The Arctic melt
- Sovereignty and sovereign right/s
- The legal regime of straits used for international navigation
- The legal status of the Passage
- Summary and conclusion

Overview of the Northwest Passage

- It is a series of linked straits passages-seven routes (Rothwell 1996)
- It connects the N. Atlantic Ocean (east) to the N. Pacific Ocean (west)
- It passes through the Canadian Arctic Archipelago
- All routes are not navigable: Thick ice and shallowness

Controversy over the Passage's legal regime

- Canada claims the Passage as its historic internal waters
 - Art. 234 of UNCLOS
- International community (led by the U.S.) asserts the Passage as an international strait
 - Governing by international law/the Polar Code
- Sovereignty v. international law

Events influenced the Passage's legal regime

- 1907-Canadian Senate's advice to possess Arctic territory-lands and islands
- 1969- the U.S. Manhattan crossing the Passage resulted in Canada:
 - The 1970 AWPPA
 - Modification of Canadian relationship with the ICJ
 - The extension of maritime boundary from 3 to 12 n.miles
- 1985-the U.S. Polar Sea crossing the Passage resulted in Canada:
 - Drawing straight baselines around its Arctic waters
- 1988- Agreement: status of the Passage, para. 3

The importance of the Passage

- Strategic/political: Cold War; Canadian new Arctic strategy; and terrorist threats
- Economy: shortcut for connecting markets; and Arctic resources
- Environment: Fragile and sensitive

The Arctic melt

- Climate change/global warming transforming world/Arctic
- Arctic sea ice recedes-not completely
- Greater human access to region
- Transportation-shipping

Shipping challenges derived from environment

- Harsh weather conditions
- Low air and water temperatures
- Existence and variability of sea ice
- Presence of ice on deck
- Safety concerns-communication systems
- Pollution accidents: oils spills; clean up operations

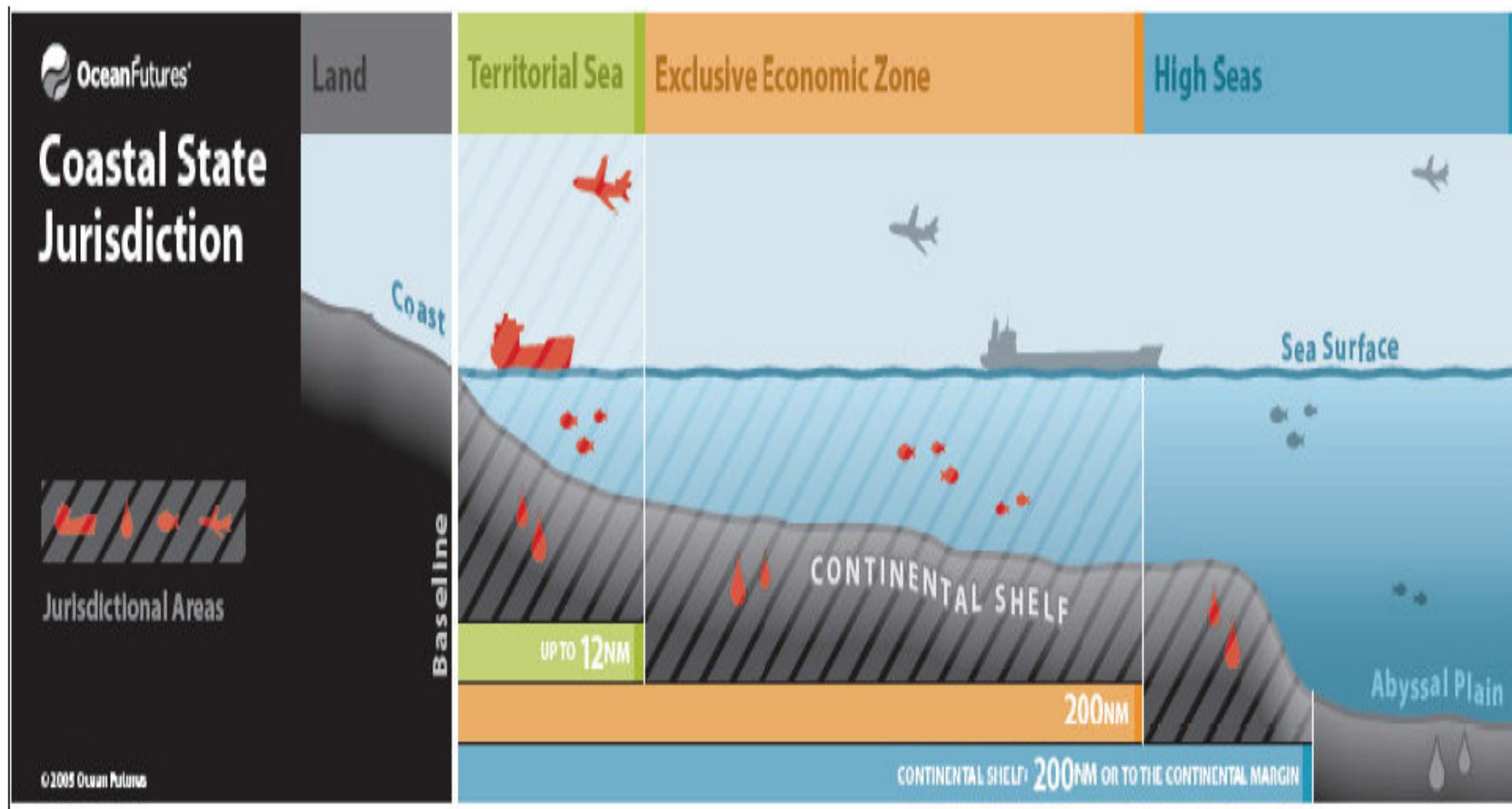
Sovereignty and sovereign right

- Territorial sovereignty: right to apply jurisdiction
 - Act of discovery as a traditional notion
 - Territorial integrity: involves state's boundaries
 - Extension of sovereignty seaward up to 12 n. miles (coastal jurisdiction)
 - UNCLOS (1982): dividing coastal jurisdiction into maritime zones
- Exclusive sovereign right: a limited jurisdiction over some maritime zones- EEZ

Coastal jurisdiction/maritime zones

- Maritime zones are measured based on baseline
 - Normal baseline (Art. 5): low water line
 - Straight baseline: a line of the shortest distance between two points in special circumstances
- Arts. 7, 10 and 76(7)

Figure 1. Coastal state jurisdiction over maritime zones
(Ocean Futures 2006).



OceanFutures (2009) Maritime Jurisdiction and Commercial Activity. OceanFutures.

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Arkiv/2006/R-FN-6%20Maritime%20Jurisdiction%20&%20Commercial%20Activity.pdf. Accessed 06 August 2015

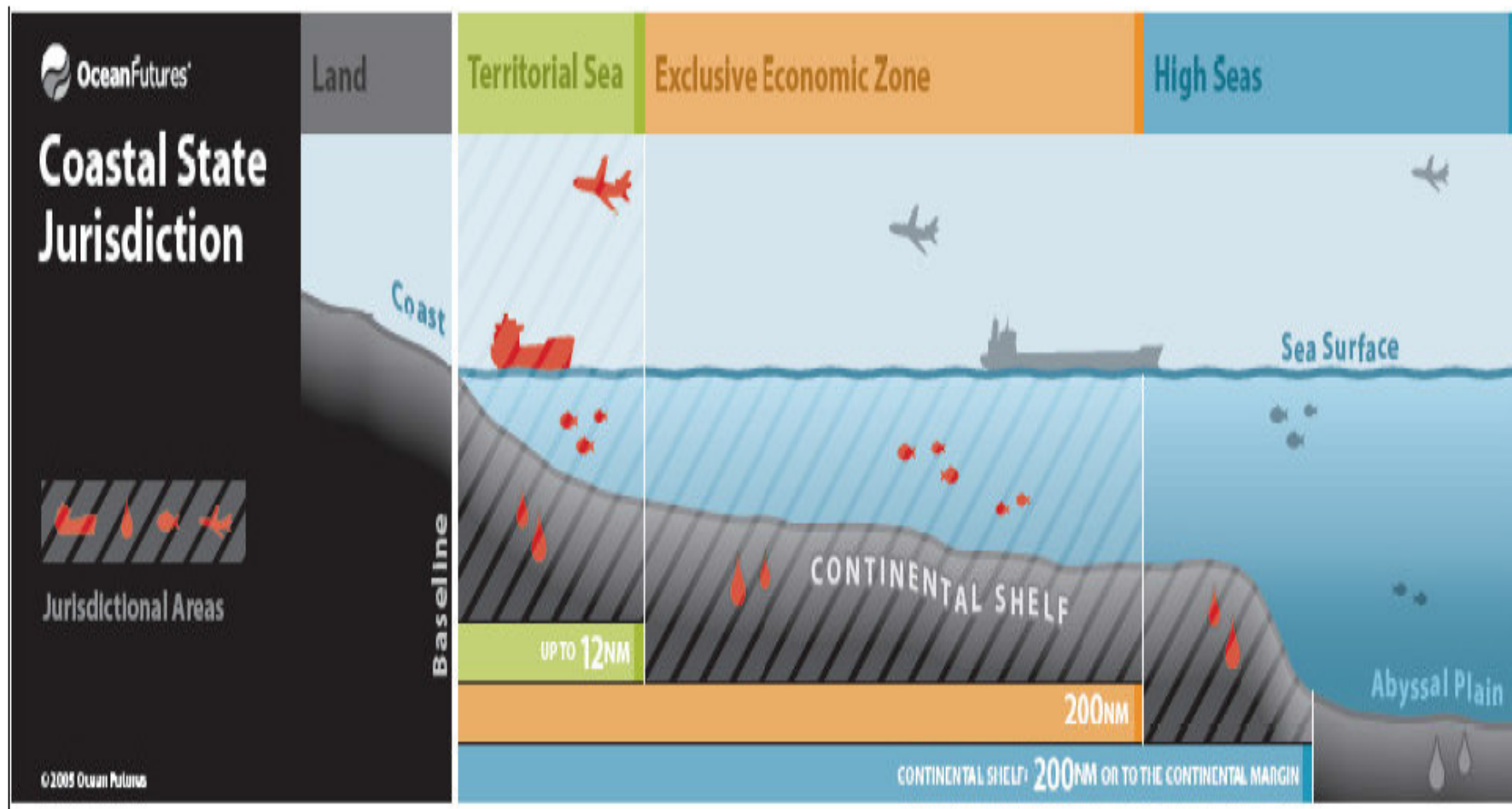
Landward side of baseline

- Internal waters: full sovereignty; no innocent passage without permission (Art. 8)
- Historic waters: no definition-treated as internal waters (the 1951 Fisheries case)
- Archipelagic waters: enclosing the archipelago based on straight baseline (Art. 50)- Canada 1985

Seaward side of baseline

- Territorial sea: extension of sovereignty - 12 n. miles (Arts. 2-3); right of innocent passage (Art. 17)
- EEZ: exceeding up to 200 n. miles (Arts. 55-57)
- The continental shelf (or continental margin): seabed up to 200 n. miles or 350 n. miles (Art. 76)
- Sovereign right: due regard to rights of other states
- High seas: freedom of navigation for all states (Art. 86)

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UNCLOS and the legal regime of straits used for international navigation

- International strait (Martin 2010)
- Transit passage: applies to straits used for international navigation (Art. 37)
 - Connecting one part of high seas or EEZ to another part of high seas or EEZ—the Passage
 - Freedom of navigation; no hamper of transit passage (Art. 44)
- Innocent passage: applies to straits forming part of territorial sea (Art. 45)
 - Respecting right of non-suspendible innocent passage (even regarding Art. 234)

The Polar Code and the legal regime of straits used for international navigation

- Binding international Code for growing shipping following 2002 and 2009 Guidelines
- Maritime safety and environmental protection
- Covering full range of navigational matters in the Polar waters-straits
- Dealing with design, construction, search and rescue, training and environmental protection
- Adaptation process: by means of amendments to SOLAS in 2014 and MARPOL in 2015
- Entering into force on 1 January 2017

The legal status of the Northwest Passage

- Suitable law?
- The 1949 Corfu Channel case criteria for qualification of a strait as international:
 - Geographical situation connecting the high seas
 - Strait used for international navigation purposes

Geographical situation of the Northwest Passage

- Respecting right of innocent passage in archipelago enclosed by straight baseline
- Historic waters and historic titles to territory tests: intention; unchallenged authority
- Northwest Passage-very long route, not a strait?
- Freedom of high seas and innocent passage
- Strait as natural waterway v. artificial one
- Environmental protection via the Polar Code
- Enclosing straits as historic waters has minor effects on int. shipping-special arrangement

Strait used for international navigation purposes

- How many voyages may constitute sufficient precedent to make the Passage an int. strait?
- The degree and the nature of navigation through the Northwest Passage:
 - Geographical perimeter:
 - Thick ice affects degree and type of navigation
 - Freedom of navigation
 - The future of sea ice: increasing shipping traffic at least in the summer

Summary and conclusion

- Climate change-receding sea ice
- Opening navigation for at least a few months
- Resurfacing the dispute between Canada and international community led by the U.S.
- Arguments that the Passage is an international strait are more prevalent- the Polar Code
- Special arrangement: between Canada and the international community
- Right of non-suspendible innocent passage- customary international law

Thank you

Any questions?